

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

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Henry W. Hodges
In the Court of Appeals
OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1916.

—
No. 2978.
No. 12, Special Calendar.
—

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THOMAS P. BROWN, APPELLANT,

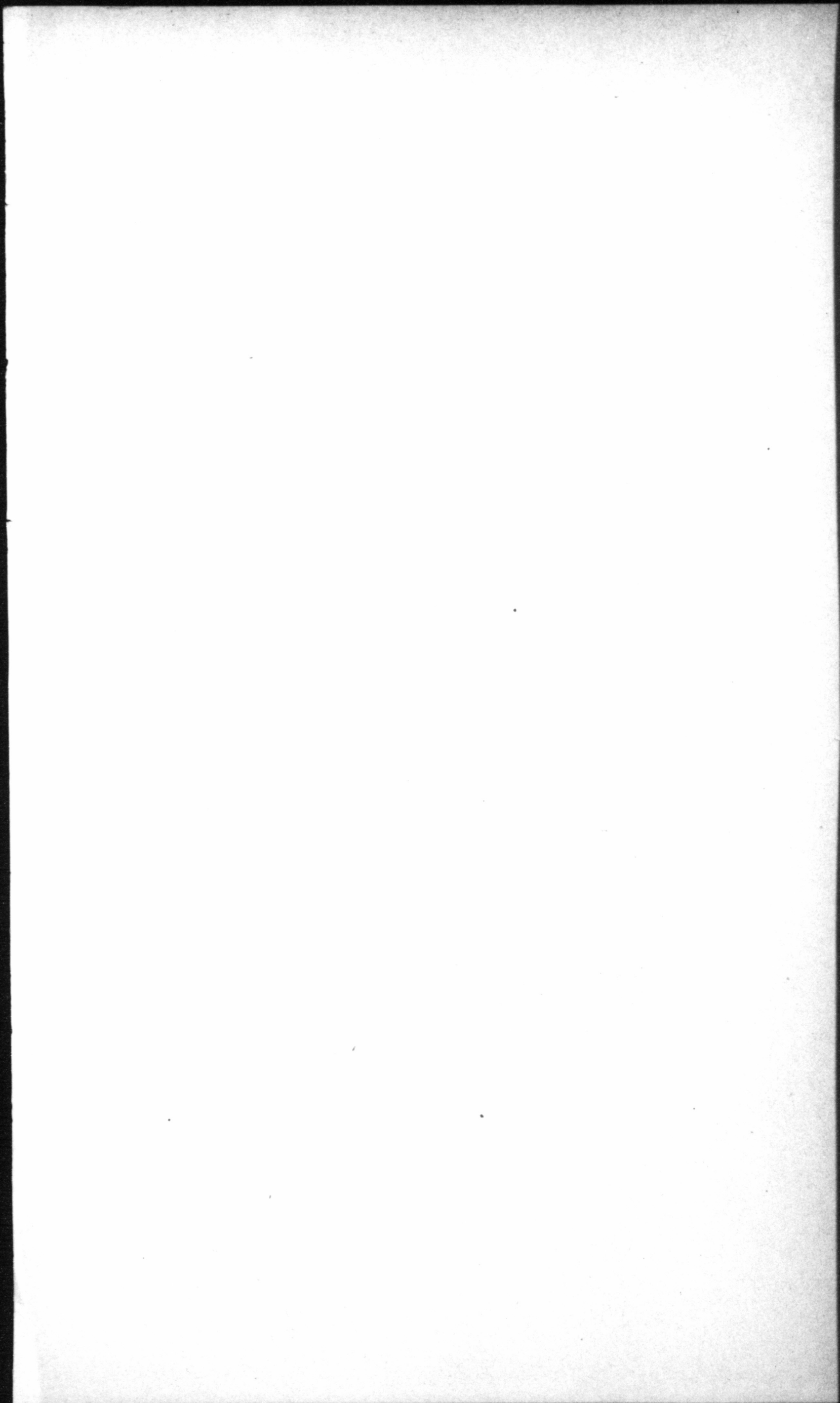
vs.

CASSIUS L. WELLS, APPELLEE.

—
BRIEF FOR APPELLANT.
—

WM. MEYER LEWIN,

Attorney for Appellant.



In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1916.

No. 2978.

No. 12, Special Calendar.

THOMAS P. BROWN, APPELLANT,

vs.

CASSIUS L. WELLS, APPELLEE.

STATEMENT OF THE CASE.

This is a special appeal from a decree of the Supreme Court of the District of Columbia, passed May 18, A. D. 1916 (R., 14), overruling the motion of the appellant and John Fitzmorris, who did not join in the appeal, to dismiss the bill of complaint filed by the appellee (R., 10).

The question is, whether under the residuary clause of the will of Adolphus G. Wells, his niece, Cecilia Hurxthal, takes the reversion, after having been given by a prior clause of the will, an interest for life. The appellee, nephew of Adolphus G. Wells, contends that his uncle died intestate as to the reversion. The appellant, as grantee of the grantee of Cecilia Hurxthal, contends that the reversion passed under the will, and claims ownership of the property in fee simple.

The opinion of the court, holding that the reversion did not pass under the residuary clause, will be found at page 11 of the Record.

The Bill.

The averments of the bill of complaint are as follows:

That on the 3rd day of November, A. D. 1901 (R., 2), a certain Adolphus G. Wells, the appellee's great-uncle, a resident of this District, departed this life, leaving him surviving two heirs at law and next of kin, namely, a brother, Christopher C. Wells, of Des Moines, Iowa, who was the appellee's father, "since deceased" (R., 2), and a niece, Cecilia Hurxthal, of Chicago, Illinois. That, in addition to these two heirs at law, the said Adolphus G. Wells left three relatives, not heirs, as follows (R., 2):

1. Cassius L. Wells, the appellee, son of the brother.
2. Carrie Hurxthal Archibald, a great-niece, daughter of his niece, Cecilia.
3. Virginia Archibald, a great-great-niece, daughter of the great-niece.

That the said Adolphus G. Wells left a last will and testament (R., 6, Plaintiff's Exhibit A), by which he gave a legacy of a thousand dollars to his nephew, the appellee; a legacy of five hundred dollars to his brother, the appellee's father; a legacy of two thousand dollars to his great-niece, Carrie Hurxthal Archibald, and a legacy of four hundred dollars to his great-great-niece, Virginia Archibald.

That at the time of his death the said Adolphus G. Wells was seized in fee simple of the hereinafter mentioned real estate, situated in said District.

That the will directed the payment of all the testator's just debts, relieves his friend, a Mr. Berry, from the payment of certain loans and makes provision for the testator's burial and the erection of a monument at a specified cost.

That by the fourth clause of his will (R., 7) the testator "devised and bequeathed" to his niece, Cecilia Hurxthal, the rents and profits of his two houses, 489 and 491 G Street, S. W., (the property in controversy in this case),

during her natural life, and appointed William B. Yoder, of Washington, D. C., as trustee to take possession and full charge of said property, rent the same, collect the rents, make all necessary repairs as in his judgment might be deemed best, pay all taxes and other lawful expenses and remit the balance of rent, less 10 per cent commission on the gross amount, to said Cecilia Hurxthal.

That the ninth clause (R., 7) of the will is as follows:

“9. After the foregoing shall have been fully carried out and settled, I devise and bequeath the residue of my estate, real, personal or mixed, wherever the same may be found, and which I may die seized of, unto my niece, Cecilia Hurxthal, of Chicago, Illinois, named as the beneficiary in item 4 hereof.”

That Charles T. Yoder, who drafted the will (R., 4) is made executor.

That, as appears by reference to the petition for the probate of the will (R., 3), which was duly probated (R., 2), and certain of the papers filed in connection therewith, there remained \$5,774.44 in personalty, for the residuary clause of the will to operate upon in favor of Cecilia Hurxthal, after the payment of all other legacies, the erection of a monument, and the payment of debts, funeral expenses and cost of administration. That the will was made during the last illness of the testator, who was seventy-eight years of age, and shortly before his death; that he was unfamiliar with legal phrases; that he relied, in the use of language, upon the advice of Charles T. Yoder, who was regarded as a close friend by the testator; that Charles T. Yoder was himself unfamiliar with the technical meaning and effect of legal language in the creation of estates by will or otherwise; that it was the intention of the testator to die intestate as to the interest in the two houses, after the termination of the life estate created by the fourth

clause of his will, and he so stated his intention at the time of the execution or drawing of the will, being advised by the said Charles T. Yoder that such was the effect of the language used.

That the said Charles T. Yoder communicated the testator's construction of the will to the appellee, the trustee, and Cecilia Hurxthal, the beneficiary, and they all acquiesced in such construction until the year 1913, "as complainant (the appellee) believes and therefore avers." (R. 4, line 8 from bottom.)

There is no contention that the appellant or John Fitzmorris knew of any such declarations, acquiescence or construction, nor that the appellant did not pay full value for the fee simple interest.

That by a deed, dated December 31st, A. D. 1913, duly executed and recorded, the defendants Cecilia Hurxthal and William B. Yoder, Trustee, conveyed the houses in question to the defendant, John Fitzmorris, for a consideration which the complainant believes to have been merely nominal, and two weeks thereafter he conveyed it to the appellant, the defendant Thomas P. Brown, who claims ownership in fee simple; whereas, the appellee contends that the testator died intestate as to the reversion, and that the appellee, as one of the heirs of the testator, has an interest in the reversion which he cannot sell to advantage because of the cloud on his title.

The prayer of the bill is that it be decreed that the appellant has an interest or estate in the houses in question for the life of Cecilia Hurxthal only; that for the purpose of removing a cloud on the appellee's property and enabling him to sell his interest, the will be construed, and the title of the appellee to the reversionary interest in said property as one of the heirs of Adolphus G. Wells be confirmed.

The bill was signed and duly verified by the plaintiff (R., 6), but while the motion to dismiss was pending (R., 10), a stipulation was signed by counsel that the bill should be

read as if amended by striking out the words "and none other" (R., 3, line 31) and inserting the words "or drawing" (R., 4, line 29).

ASSIGNMENTS OF ERROR.

The Court erred:

1. In overruling the motion to dismiss the bill.
2. In holding that the reversion did not pass under the residuary clause.

POINTS AND AUTHORITIES.

I.

Construction of the Will and Admissibility of Declarations, Properly Raised by Motion to Dismiss.

Under Equity Rule 32 of the Supreme Court of the District of Columbia the motion to dismiss takes the place of the demurrer. The motion, therefore, does not admit the averments of the bill as to the construction of the will, but raises thereon a matter of law for the determination of the Court.

Naganab vs. Hitchcock, 25 App. D. C., 200, 204.

The motion also reaches the question of the admissibility of the testator's declaration as to his intention, for, like the demurrer, the motion admits only such averments of the bill as are *well pleaded*. It does not admit that the construction of the will set forth in the bill is the true one, *nor that its legal effect* is contrary to that which its language imports. The *very object* of a demurrer in such a case is to submit the question presented by the instrument *as a matter of law for the determination of the Court*.

Interstate Land Co. vs. Maxwell Land Co., 139 U. S., 569, 577-8.

In an opinion by Chief Justice Shaw, of Massachusetts, the court said:

"All the facts well pleaded in a bill are admitted by demurrer. But if a party alleges another and *parol* agreement *inconsistent* and incompatible with the written agreement, *which it would not be competent to control by parol evidence, the defendant may safely demur.*"

Upon the plaintiff moving for leave to amend, the court said:

"The amendment proposed would raise only the same questions which have been decided on the demurrer.

"It offers to vary the case by parol evidence, which we have held inadmissible."

Lea vs. Robeson, 12 Gray, 280, 285, 286, 287, cited and followed in

Dillon vs. Barnard, 21 Wall., 430, 438.

See also Story Equity Pleading, 10th ed., Sec. 452, note (a).

By parity of reasoning the motion raises the question of the effect of the acquiescence by the executor, the trustee, the niece and the plaintiff in the construction sought to be placed upon the will by the testator through his declarations. (R., 4).

Declarations Inadmissible.

The declarations of the testator are not admissible. We must look to the provisions of the will alone for its meaning. Any statements on the part of the testator as to his intention are inadmissible to show the *construction* or *extent* of the devise.

Atkins vs. Best, 27 App. D. C., 148, 152.

Barber vs. Pittsburg Ry., 166 U. S., 83, 109.

There is no uncertainty or doubt as to the meaning of the terms employed in the residuary clause of the will. *They are plain words, admitting of no doubtful meaning.* And in such case, the well settled general principle is, as deduced from all the authorities, that a testator is always presumed to use the words in which he expresses himself according to their strict and primary acceptation, unless, *from the context of the will*, it appears that he has used them in a different sense. The will must be *complete in itself*, and not be dependent upon *extrinsic* evidence to show what is *really intended* to be devised by it. *This would seem to be too plain to require the citation of authorities for its support.*

Crenshaw vs. McCormick, 19 App. D. C., 494, 502-03.

Evidence cannot be heard to show a *different* intention in the testator *from that which the will discloses.*

Wilkins vs. Allen, 18 How., 385, 393.

In a case going up from this District, the Supreme Court of the United States said:

"We concur with the Court of Appeals, speaking by Chief Justice Shepard, in holding that the words in question are *unambiguous*, and their obvious, *ordinary* meaning must not be defeated by conjecture."

Travers vs. Reinhardt, 205 U. S., 423, 432.

In another case it was shown by evidence of *the attorney who made the will*, that the testator gave him information and instruction of which he made brief notes. The word "proceeds," said the court, seems to be aptly used when taken in its common, ordinary meaning; and that is the sense in which all words of a will are to be taken, unless there is some plain indication to the contrary *either in the clause itself* or the context. The intention of the testator

cannot be explained, *much less varied*, by evidence of his *declarations* made *at the time* that the will was *in course of preparation*. The notes taken by the attorney for use in writing the instrument were *clearly inadmissible*.

Kaiser vs. Brandenburg, 16 App. D. C., 310, 315, 317, 318.

Hartwell's testimony of statements *at the time* the will was *drawn and executed* that he wanted his son to have the fee was inadmissible.

Defreese vs. Lake, 109 Mich., 415, 419.

Under any other rule no purchaser of a title by devise would be safe.

The declarations in this case do not fall within any of the well known exceptions, as a part of the *res gestae*.

Throckmorton vs. Holt, 180 U. S., 552, 575.

"Construction by Parties."

It is well said by the learned chancellor in the court below at the close of his opinion (R., 14), in declining to consider the averments in regard to the acquiescence by certain parties in the construction of the will by the inadmissible declarations of the testator (R., 4), that there is no statement to the effect that anyone has *changed his position* by virtue of such construction, either by acting or failing to act on account of it.

Whether the testator died intestate as to the fund in question is a matter of *construction* and not a matter of fact. The court must act on its own views of the law. *The admissions of the parties are not entitled to control.*

Turner's Appeal, 48 Mich., 369, 373.

In most of the cases the courts seem not to have lost sight of the fact that the will sought to be "construed" by the "parties" is not the will of the *beneficiaries* but of the *testator*, and an examination of the authorities will disclose that wherever such construction is given weight by the court, in the absence of a manifest ambiguity, it has been because of (1) a *compromise* of some *bona fide* dispute, of which compromise a court of equity would decree *specific performance*, or because of (2) some basis for estoppel.

The case of *Emery vs. Haven* affords an illustration of the unwillingness of the courts to permit *beneficiaries* to make wills for their *testators*, or to *construe* them for the courts in plain cases.

A mother, being apprehensive that she had executed a certain power by the residuary clause of her will, to her daughters, to the exclusion of her sons, induced the daughters to execute *and deliver to her* a most formal and comprehensive instrument, *under seal, construing* the will, disclaiming and releasing all interest in the fund under the residuary clause, and covenanting to execute any further releases, *or other documents*, that might thereafter become necessary to effectuate their mother's intention. The mother retained possession of the instrument in question until her death.

After her decease the daughters claimed that the power was executed by the residuary clause.

Held: If the testatrix had *declared* in positive and unmistakable terms, *orally* or in *writing*, that she *did not intend* to execute the power by the residuary clause of her will, *the declaration could not be considered in the interpretation of the will*. Her expression of fear that her will would be misconstrued on this point, and her act in inducing the daughters to make the agreement, are equally incompetent. The fact that she owned *other property* upon which the will operated is not considered by the court in determining the

intention of the testatrix in the use of the words "my estate and property of every description."

Emery v. Haven, 67 N. H., 503.

The Testator's Intention, as Disclosed by the Will.

Did Adolphus G. Wells die *intestate* as to the *reversion* of the real estate mentioned in the fourth clause of his will? (R., 7).

The appellant insists that upon reason and authority and by every recognized canon of construction, Adolphus G. Wells disposed of his entire property and did not die *intestate* as to any part thereof.

He *begins* his will by declaring that he does "make, constitute, appoint and publish *this as my last will* and testament and *concludes* with a *residuary clause*, by which he devises and bequeaths the residue of his estate, *real, personal, or mixed, wherever the same may be found* and which he might *die seized of*.

It may be laid down as a *general proposition* that where a testator makes a general devise of his real estate, *especially by a residuary clause*, he will be considered as meaning to dispose of such property *to the full extent of his capacity*, for the law frowns upon a construction of a will that admits of a partial intestacy.

Taylor vs. Leesnitzer, 37 App. D. C., 356, 361.

Galloway vs. Galloway, 32 App. D. C., 76, 80.

The idea of anyone deliberately purposing to die *testate as to a portion* of his estate *and intestate as to another portion* is so *unusual* in the history of testamentary disposition as to justify *almost any construction* to escape from it.

English vs. Cooper, 183 Ill., 203, 209.

The words "all the estate, real and personal, of every nature and description, in law or equity," are broad enough to cover *every description* of vested right and interest attached to and growing out of property. Under such words *the whole property of a testator would pass to his devisee*. The words of the residuary clause in this case: "I devise and bequeath the residue of my estate, real, personal or mixed, wherever the same may be found, and which I may die seized of" are the full equivalent of the words first quoted.

Williams vs. Heard, 140 U. S., 529, 543.

Lambert vs. Paine, 3 Cranch, 97, 134, 135.

The Testator Was "Seized" of the Reversion.

Without adverting to what constituted, in the ancient law, a seisin in law, as contradistinguished from a seisin in deed, it is sufficient to say that for centuries the language of the law has been that a reversioner is "seized" of the reversion, although defendant upon an estate for life.

1 Washburn Real Prop., 6th Ed., Sect. 116.

Seizin was *originally* the completion of the feudal investiture. In American jurisprudence it means, generally, *ownership*.

McNitt vs. Turner, 16 Wall., 352, 361-2.

No Heir Forgotten.

It will be observed that the testator *recognizes* both of (all) his direct heirs in the will.

He gave his brother, Christopher C. Wells, the appellee's father, \$500, (R., 7). He thereupon proceeded to make provision for his remaining heir, Cecilia Hurxthal, in the words now under review.

In this case the testator not only gave to each of his two

heirs but he remembered his brother's son and the daughter and granddaughter of his niece.

The circumstances that his mind was clearly directed to each, and that he has *carefully measured out his bounty to each*, discriminating between them so as to show perhaps some inequality of affection, *operate powerfully* against the opinion that he intended to leave any part of his property to descend upon them *by the silent operation of the law*.

Galloway vs. Galloway, 32 App. D. C., 76, 79.

Finlay vs. King's Lessee, 3 Peters, 346, 379.

And the heir is no longer favored.

Atkins vs. Best, 27 App. D. C., 148, 153.

No Conflict Between the Clauses.

It would *seem* that the fourth clause comes under the rule that a devise of the *rents and profits* passes the *land itself*.

Pollock vs. Farmers' L. & T. Co., 157 U. S., 429, 580, 589.

But this is not deemed important, since the same rules of law apply irrespective of the character of Cecilia Hurxthal's rights.

Doe vs. Considine, 6 Wall., 458, 469.

The court below in its opinion (R., 13, bottom), holds that if the contention of the appellee were sustained, the effect would be to defeat a *clearly expressed intention* and, in that connection, says that it would be difficult to suggest a reason consistent with an intention to give a fee for the provision in clause four giving to the trustee 10 per cent. commission on the gross rents of the property.

If a specific reason be necessary for the application of a positive rule of law it will be remembered that Cecilia

Hurxthal, no longer young, resided in Chicago, and the trustee was then in Washington, where the property was situated. It may have been unnecessary to do so, but it was reasonable for the testator to desire to make some arrangement for the care and management of the houses, and to make a definite provision for such management instead of *advising* her to employ William B. Yoder, probably a relative of his friend, Charles T. Yoder, the executor. If this is the correct theory, the 10 per cent. feature would follow logically. When the trustee removed to Pittsburgh (R., 2), it would be no longer possible for him to manage the property and it was not unreasonable for Mrs. Hurxthal to desire to change the investment to property nearer home.

Reason for Separating the Reversion from the Life Estate.

The rule in a case such as this is, that where a testator gives several legacies, and then makes a general residuary disposition of the whole estate, blending the realty and personalty together in one fund, the real estate will be charged with legacies.

Readman vs. Ferguson, 13 App. D. C., 60, 73.

And, while he did not wish the legacies to be charged against the real estate, *during Cecilia's life*, he was willing that the *reversion* might be sold, if necessary, for their payment, if such charge should prove to be necessary.

O'Brien vs. Dougherty, 1 App. D. C., 148, 164.

Notwithstanding the fact that the testator died soon after making his will, he did not know when he executed it how long he had to live, and how much of his few thousands would be necessary for his own maintenance, therefore,

out of abundant consideration for the care of his niece during her life, he confined the charge of the legacies to the reversion, if such charge should prove to be necessary.

The Effect of "After" in the Residuary Clause.

The term "after" does not designate the time at which one thing is done in reference to something else; but it expresses the *relative priority* and subordination of one claim to another *in matter of right*.

Leadwell vs. Cordis, 71 Mass. (5 Gray), 341, 353.

In a New Jersey case, strikingly like this case in that particular, the question arose as to the effect of "after" in a residuary clause, upon a lapsed legacy. After certain general bequests the *residuum* was disposed of as follows: "I give and bequeath whatever of my property shall remain *after* payment of the above, and due settlement of all my business, to my friends M. and P."

As in this case, the learned chancellor in the court below thought that the case came within the exception to the general rule as to lapsed legacies passing under the residuary clause, because *the estate given* was that which should *remain* "after" payment of the legacies before given. On appeal this was reversed, on the ground that the extent of the gift was not limited by the use of the word "after."

Tindall vs. Tindall, 24 N. J. Eq., 512.

Case Relied Upon by Appellee.

Johnson vs. Stanton is relied on by the appellee and cited in the opinion of the court (R., 13).

The point is succinctly stated by prevailing counsel in that case (at page 301), as follows:

"A residuary clause in general terms does not pass property when there is a previous partial bequest of the same property, inconsistent with the residuary clause."

The court in its opinion in that case, says that if the residuary clause *should* be held to include the fund in question, certain *other* provisions of the will would be rendered wholly nugatory.

Johnson vs. Stanton, 30 Conn., 297.

Without conceding or denying the correctness of the decision in *Johnson vs. Stanton*, the appellant would direct attention to the fact that no provision whatever in the fourth clause of the will of Adolphus G. Wells is "rendered nugatory," *nor in any way affected*, by construing the residuary clause as passing the reversion, which is separate and distinct from the life estate.

Question no Longer Open in this Jurisdiction.

There is nothing in the fourth clause of the will to prevent the reversion from passing under the residuary clause, which is ample to carry the reversion, even though the beneficiary is the same in both clauses.

Young vs. Norris Peters Co., 27 App. D. C., 140, 147.

Davis vs. Callahan, 78 Me., 313, 318.

Craig vs. Rowland, 10 App. D. C., 402, 414.

Mayer vs. Am. S. & T. Co., 33 App. D. C., 391, 398.

There is nothing inconsistent or repugnant in the gift of a life estate with a remainder to a life-tenant, even though such remainder can never come into the possession of the remainderman.

Cushman vs. Arnold, 185 Mass., 165, 169.

Chesman vs. Cummings, 142 Mass., 65, 70.

While it may be *unusual* it is by no means unheard of for a testator to devise a life estate and leave the *remainder to a class that would include the life-tenant*.

Robinson vs. Mitchell, 99 Md., 50, 62.

The construction of the residuary clause is not dependent upon the testator's *intention* "in the loose sense of the word" (18 App. D. C., 24, 25, 26), for *one of the objects* of a residuary clause is to gather up *unremembered* rights.

Mayer vs. Am. S. & Tr. Co., 222 U. S., 295, 300.

Residuary Clause Liberally Construed.

A general residuary devise carries every real interest, whether known or unknown, immediate or remote, unless it is *manifestly excluded*. The intention to include is presumed, and an intention to exclude must appear from other parts of the will, or the residuary devisee will take.

Floyd vs. Carow, 88 N. Y., 560, 568, cited with approval in 113 N. Y., 115, 127.

Either Cecilia Hurxthal or No One.

There is no one named or designated as devisee of the remainder, if only a life interest is to be carved out of the testator's estate. Such a construction would not only be *contrary to the express language of the residuary clause*, and would uphold only a portion of the whole will, but would result in intestacy, an effect which courts in this country and in England have for a long time sought to avoid *unless absolutely forced upon them*.

Davis vs. Callahan, 78 Me., 313, 318, cited in 27 App. D. C., 147.

The reference to Cecelia Hurxthal as "named as beneficiary in Item 4 hereof" was not more significant than if she had been mentioned as "said Cecelia Hurxthal" or

"Cecelia Hurxthal *hereinbefore mentioned*," or "*hereinbefore named*."

The Reversion is Not the Same (1) Land, (2) Property, or (3) Estate That Was Devised by "Item 4."

A devise of lands "not before devised," or "not before disposed of" carries the *reversion* in lands which the testator had previously devised for life.

- Jarm. Wills, 6th Ed., Bigelow, star page 617.

There is *no room for doubt* that a devise of his "other land" carries the reversion after a devise of the *same tract* to the testator's wife during her life or widowhood.

Watson vs. Watson, 110 Mo., 164.

A devise of *all the property that I have not willed away* passes the reversion in land after a devise of a life estate to his wife in that same tract.

Page vs. Atkins, 60 N. C., 268.

Testator's "Other Real Estate."

When the bill was filed it contained in the fifth paragraph (R., 3), the averment that at the time of his death the testator was seized in fee of the real estate in controversy "*and none other*."

While the motion to dismiss was pending it was stipulated that the words "*and none other*" should be struck out.

It is stated twice in the opinion of the court (R., 11, 13) that it does not appear whether the testator owned any real property other than the two houses in question.

The appellant insists that it does appear that the testator did not own any other real estate.

The amendment was made by consent, but the fact that

it was so made does not prevent both the original pleading and the form and character of the amendment from being subject to comment.

Union Pacific Ry. Co. vs. Wyler, 158 U. S., 285, 298.

The bill is signed by the plaintiff himself (R., 6), and he swears that he has read the bill and *knows the contents thereof*. After all these years of knowledge of the situation, with aid of counsel here, he was willing to make oath that the testator had no other real estate than the two houses in question.

Furthermore, he was familiar with the proceedings in the Probate Court, and especially "the petition for probate of the will" (R., 3, line 1). That petition was filed by the executor, the testator's "close friend," "who drafted the will" (R., 4).

By rule of court, in force at that time, of which this court will take judicial notice, the petition for probate was required to state *all* real estate owned by the testator, "the character and where situated or being."

Orphans' Court Rules, passed November 8, 1898, 8 Gen. Term Mins., 299.

The attention of the court is especially called to the document by the bill of complaint (R., 3), "by reference to the petition for probate of the will."

If the testator had *known* if any other real estate, and his knowledge is the only thing about it that could be important, surely his close friend, the executor, would have known something about it in which event it would have been mentioned in the petition. Of course, if it had been mentioned in the petition the words "*and none other*" would never have been in the bill, under the plaintiff's oath, and if during all these years the plaintiff had learned of the existence of any other real estate its mention, with "the character and where

situated or being," would have been included in the amendment. Add to this the rule that the bill is construed against the plaintiff, and while it may not be important, it does appear that the testator owned no other real estate.

Pope vs. Allis, 115 U. S., 363, 370.

Wyles vs. Berry, 116 Ky., 377, 380.

Boots vs. Canine, 94 Indi., 408, 416.

Conclusion.

For these reasons the decree appealed from should be reversed and the cause remanded with directions to dismiss the bill.

Respectfully submitted,

WM. MEYER LEWIN,

Attorney for Appellant.

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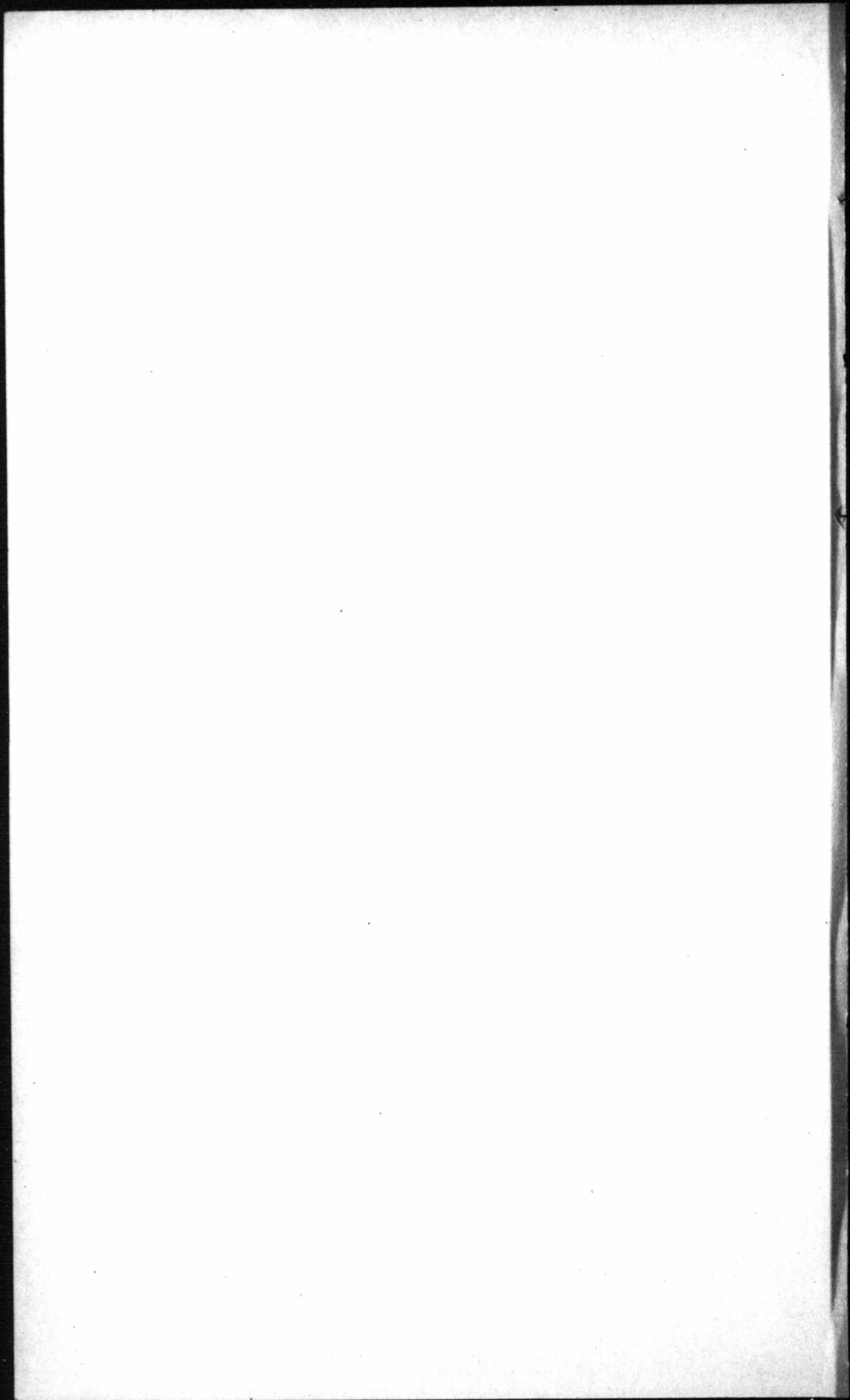
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BRIEF FOR APPELLEE.

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INDEX

	PAGE
The question before the Court.....	1
A simple reading of the will shows intention...	2-3
The condition of testator's estate.....	3-4
The intention should prevail, there being no positive rule of law.....	4-5
The two clauses considered together.....	5-7
Authorities	7-13
Appellant's construction eliminates fourth clause	13-14
The rule in favor of the heir.....	14-17
Appellant's construction against only heir.....	17
The construction of the parties, and of the testator	18-21
The extraneous evidence admissible.....	21-27
Situation of testator	21
The meaning of "residue".....	22
Ambiguity can be explained.....	23-25
Evidence part of <i>res gestae</i>	24, 25-6
Appellant's cases not applicable.....	26
Motion below admits facts and raises question of competency	26-27
Other portions of Appellant's Brief.....	27-37
Appellant's construction defeats primary intent.	31
Conclusion	37

TABLE OF CASES.

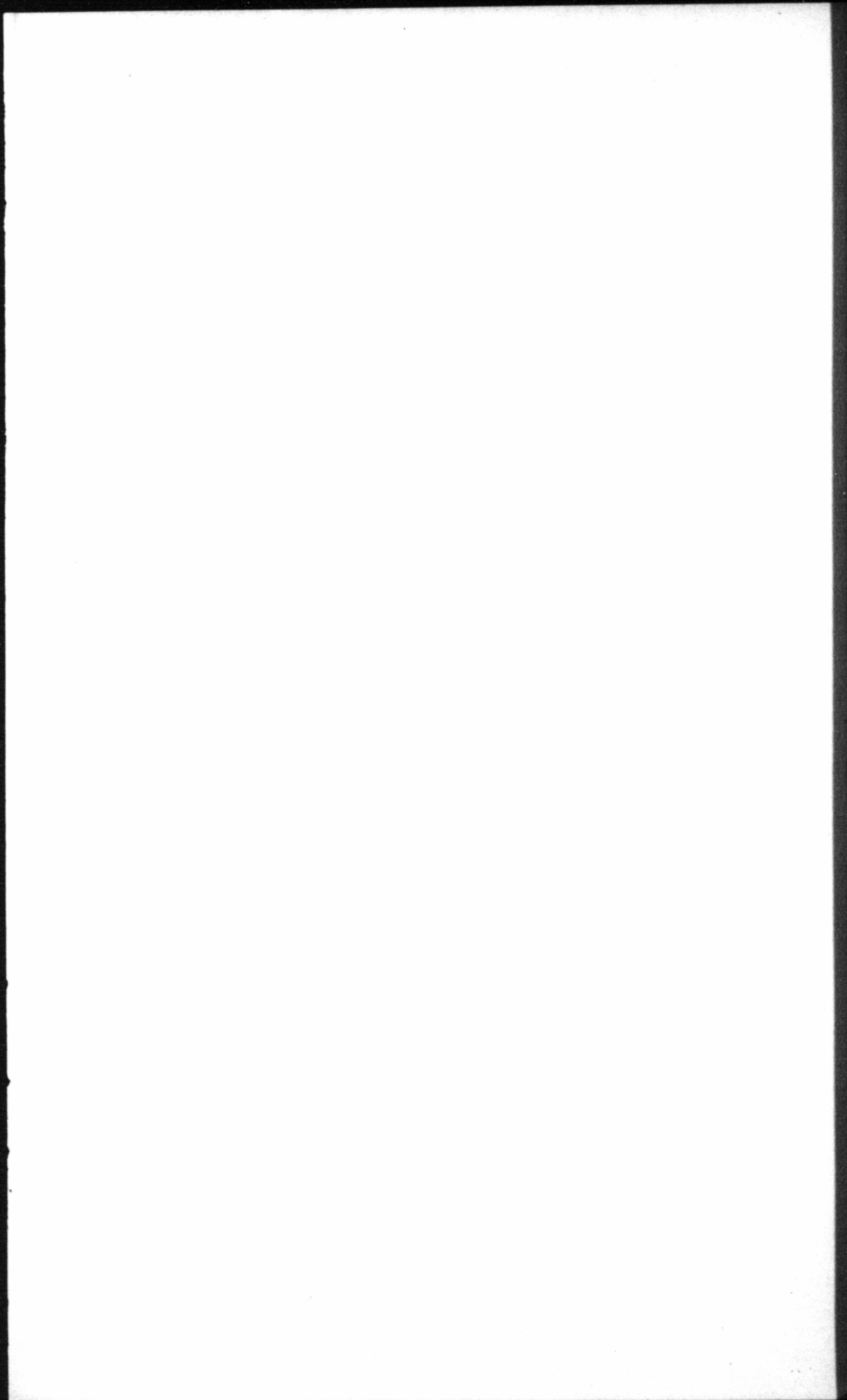
Adams vs. Massey, 184 N. Y., 62.....	9
Allum vs. Fryer, 3 Ad. & El., N. S., 442.....	6, 12
Andrus vs. Vreeland et al., 29 N. J. Eg., 394...	14, 29
Areson vs. Areson, 3 Den., 458, 464.....	10
Catkins vs. Best, 27 App. D. C., 148, 153.....	15, 21

	PAGE
Beall vs. Holmes, 6 H. & J., 205, 209, 210	15
Blake vs. Hawkins, 98 N. S., 315, 324	21
Bumpus vs. Bumpus, 79 Hun., 526, 530	10
Cecil et al. vs. Cecil et al. (1914), 161 Ky., 419.	11
Chase et al. vs. Stockett et al., 72 Md., 235, 241-2	21
Chesman vs. Cummings, 142 Mass., 65	34
Clarke vs. Boorman's Ex., 18 Wall., 493, 502-3	3
Colville vs. American Security & Trust Co., 10 App., 64, 68-9	27
Coulter vs. Crawfordsville Co., 45 Ind. App., 64	19
Craig vs. Rowland, 10 App. D. C., 402	33
Cruit vs. Owen, 25 App. D. C., 514, 519	4, 13, 21
Cushman vs. Arnold, 185 Mass., 165, 169	34
Dabney, Executors of, Rand. (Va.), 191, 201 . .	5
Davis vs. Callahan, 78 Me., 313	32
Dawson vs. Waggaman, 23 App. D. C.	26
De Vaughn vs. De Vaughn, 3 App. D. C., 50, 53	4, 7
Doe vs. Considine, 6 Wall., 458, 469	29
Doe vs. Roe, 1 Wend. (N. Y.), 542, 550	24
Duncan et al. vs. Wallace, 114 Ind., 169, 171	31
Dunn et al. vs. Hines et al., 164 N. C., 113, 116.	28
Emery vs. Haven, 67 N. H., 503	20
English vs. Cooper, 183 Ill., 203, 209	28
English's Estate, 242 Pa. St., 445, 457	28
Faul vs. Hulick, 18 App. D. C., 24, 25	34
Finlay vs. King's Lessee, 3 Peters, 346, 379 . .	17
Floyd vs. Carow, 88 N. Y., 560, 568	35
Fowler vs. Fay, 62 Ill., 375, 377	14, 29
Galloway vs. Galloway, 32 App. D. C., 76, 79 . .	17, 28
Graham vs. Graham, 23 W. Va., 36, 40	13, 14
Hambleton vs. Darrington, 36 Md., 434	35

	PAGE
Harris vs. Mills, 4 N. C., 149.....	12
Harvey vs. Kennedy et al., 80 N. Y. S., 878...	31
Holcomb vs. Wright, 5 App. D. C., 76, 83.....	4, 21
Hooe vs. Hooe, Wythe (Va.), 190.....	19
Horde vs. M'Roberts, 1 Call. (Va.), 337.....	12
Hoyt et al. vs. Hoyt et al., 69 N. H., 303, 305	31
Hunting vs. Emmart, 55 Md., 266, 276-7.....	23
Jessup et al. vs. Witherbee Co., 117 N. Y. S., 276	19
Johnson vs. Stanton, 30 Conn., 297.....	11
Johnson vs. Washington L. & T. Co., 33 App. D. C., 242, 257.....	7, 12
Kennon vs. M'Roberts, 1 Wash. (Va.), 96, 111	12
Killam vs. Adams, 52 Barb. (N. Y.), 605...	2
Klock vs. Stevens, 45 N. J. S., 603, 606.....	25
Ladies' Union Soc. vs. Van Netta, 88 N. Y. S., 413	24
Lambert's Lessee vs. Paine, 3 Cranch, 97, 129, 131	26, 28
Leadwell vs. Cordis, 71 Mass. (5 Gray), 341, 353	32
Lynch vs. Lynch et al., 37 W. L. R., 11.....	13, 21
McAleer vs. Schneider, 2 App. D. C., 461, 467	15
McCaffrey vs. Manogue, 196 U. S., 563, 569..	14
McGuigan vs. Jaeger, 36 App. D. C., 227, 229-30	12
Mather vs. McClure, 136 N. Y., 238.....	30
Montgomery vs. Brown, 25 App. D. C., 490, 493	4, 5
Mayer vs. American S. & T. Co., 33 App. D. C., 391, 398, 222 U. S., 295, 300.....	33, 34
Moore's Estate, 241 Pa. St., 253, 257.....	4
Morgan vs. Burrows, 45 Wisc., 211, 279.....	24

	PAGE
Mudge vs. Blight, Cowper, 355; 1 Munf. (Va.), 548	15
Nolan vs. Bolton, 125 Ga., 352.....	26
O'Brien vs. Dougherty, 1 App. D. C., 148, 164.	32
Page vs. Atkins, 60 N. C., 268.....	36
Pate vs. French, 122 Ind., 10, 14.....	19
Phillips et al. vs. Melson et al., 3 Munf. (Va.), 76	12
Pollock vs. Farmer's L. & T. Co., 157 U. S., 429, 580, 589	29
Pullman Co. vs. Missouri Pac. Co., 115 U. S., 587	26
Readman vs. Furgerson, 13 App. D. C., 60, 73.	31
Riker et al. vs. Cornwell et al., 113 N. Y., 115..	35
Robinson vs. Mitchell, 99 Md., 50, 62.....	34
Schlottman vs. Hoffman, 73 Miss., 189.....	23-4
Shaw vs. Bull, 12 Mod., 593.....	6
Smith et al. vs. Bartlett, 79 App., 174, 178....	19
Simms vs. Georgetown College, App. D. C., 72.	29
Smith vs. Bell, 6 Pet., 68.....	4
Smith et al. vs. Roberts, 91 N. Y., 470.....	14, 29
Stewart vs. Masterson, 131 U. S., 151, 158....	5, 36
Strong vs. Seatt., 2 Burr., 912.....	35
Taylor vs. Leesnitzer, 37 App. D. C., 356, 361..	28
Tobias vs. Ketcham, 32 N. H., 319, 330.....	2
Toronto vs. Chicago, etc., R. R. Co., 123 N. Y., 37	2
Travers vs. Rheinhardt, 25 App. D. C., 567.....	18
Turnner's App., 48 Mich., 369, 373.....	19
Turnner et al. vs. Mather et al., 83 N. Y. Suppl., 1013	31
Van Gillurve et al. vs. Becker et al., 106 N. Y. S., 1080	31

	PAGE
Vogt vs. Vogt, 26 App. D. C., 46.....	29
Walston's Lessee vs. White, 5 Md., 297.....	21, 22-3
Warner vs. Miltenberger's Lessee, 21 Md., 264.	21
Watson vs. Martin, 228 Pa. St., 248, 250....	27-28
Watson vs. Watson, 110 Mo., 164.....	36
Wright vs. Page, 10 Wheat, 204, 227, 288....	14
William vs. Heard, 140 U. S., 529, 543.....	28
Wiltsie vs. Shaw, 100 N. Y., 191, 196.....	31
William vs. Goodtitle, 10 B. & Cr.....	33
Young vs. Norris Peters Co., 27 App. D. C., 140, 147	32
24 Am. & Eng. Ency., 420 et seq.....	13
Shouler, 5th Ed., Sec. 474.....	12
Washburn vs. 6th Ed., 116.....	29
Wharton, Ev., Sec. 992.....	25
Code, Sec. 1019	13, 29
Code, Sec. 146	31
Code, Sec. 1617	2



In the Court of Appeals of the District of Columbia.

OCTOBER TERM, 1916.

No. 2978.

No. 12, Special Calendar.

THOMAS P. BROWN, APPELLANT,

vs.

CASSIUS L. WELLS, APPELLEE.

BRIEF FOR APPELLEE.

The appellant moved to dismiss the bill below on the ground that it shows on its face the plaintiff has no right, title or interest in the real estate mentioned specifically in the fourth clause, and on the further ground that "the said real estate was devised in fee simple to the defendant, Cecelia Hurxthal" (R., 10); so that the question before the court, in form and substance, was, did she take a life estate or a fee in that property? The court decided, not that the reversion did not pass under the ninth clause, but that, *construing the whole will*, it appeared the intention was to give Mrs. Hurxthal only a life estate in the property in question. There being nothing in the case to prevent the court from construing the will in accordance with the testator's intention, as expressed, the will

was so construed. There was, in fact, no reversion unless in the heir at the death of the testator (Code, Section 1019, and *infra*, p. 13), and the only heir shown by the bill was testator's brother, Christopher, father of the appellee (R., 2).

Looking only to the four corners of the will, we respectfully submit it is apparent the intention of the testator expressed therein was to give Cecelia Hurxthal only an equitable life estate in the property mentioned in the fourth clause of the will, which reads as follows:

"4. I devise and bequeath to my niece, Cecelia Hurxthal of Chicago, Ill., the rents and profits of my two houses, Nos. 489 and 491 'G' Street, S. W., Washington, D. C., *during her natural life*, and hereby nominate and appoint William B. Yoder of the City of Washington, D. C., as trustee, to take possession and full charge of said property, rent the same, collect the rents, make all necessary repairs as in his judgment may be deemed best, pay all taxes and other lawful expenses and remit the balance of rent, less 10 per cent commission in the gross amount, to said Cecelia Hurxthal."

This property is not again mentioned, and the above devise could hardly be more explicit and definite for life only as to Mrs. Hurxthal. Whether the trustee took the fee with a resulting trust for the heir, or an estate for the beneficiary's life, in either event it is clear from the active duties imposed upon him that he took the legal estate. (Killam vs. Adam, 52 Barb. (N. Y.), 605; Tobias vs. Ketcham, 32 N. Y., 319, 330; Toronto Trust Co. vs. Chicago, B. & Q. R. R. Co., 123 N. Y., 37; Code, Section 1617.) The appellant's contention that the fee simple estate passed to Mrs. Hurxthal is based on the ninth clause, which is as follows:

"9. After the foregoing shall have been fully carried out and settled, I devise and bequeath the residue of my estate, real, personal or mixed, wherever the same may be found, and which I may die seized of, unto my niece, Cecelia Hurxthal of Chicago, Ill., named as the beneficiary in item 4 hereof."

A simple reading of these two clauses makes it plain that the testator gave Mrs. Hurxthal only a life estate in the G Street property, and that he did not contemplate that property in the ninth clause, except to reaffirm the previous devise by the concluding words of the ninth clause itself. The limitations and trust provisions of the previous devise are irreconcilable with an intent to give the fee.

"It may well be doubted if any other source of enlightenment in the construction of a will is of much assistance, than the application of natural reason to the language of the instrument under the light which may be thrown upon the intent of the testator by the extrinsic circumstances surrounding its execution, and connecting the parties and the property devised with the testator and with the instrument itself."

Clarke vs. Boorman's Ex'rs., 18 Wall., 493.
502-3.

Mr. Wells was 78 years old when he made this will; he was unlearned in the law, and relied on the aid of the draftsman, who was also unlearned in law, and who told him the effect of the language used was to leave him intestate as to the reversion (R., 4); the testator had some \$8,000 in cash, also \$200 in stock, \$1,500 in promissory notes *secured on real estate*, and about \$8,000 in other promissory notes, \$3,200 of which he canceled by his

will; he also owned the G Street property. Reading the will in the light of these facts, the testator knowing all its provisions would go into effect at the same time, it is respectfully submitted that, without regard to the construction of the parties or the declarations of the testator, it is clear the "residue" contemplates the various other properties not specifically mentioned in the will, and that the ninth clause was not intended to affect the fourth clause in any way, but was intended to except the G Street property from the ninth clause, and to reaffirm the previous devise of that property as it stood. In the previous devise, when testator referred to the property by street numbers, he limited the estate of Mrs. Hurxthal to the rents and profits *for life*, and appointed a trustee with complete control, and with a 10 *per cent commission*. In view of these specific words of the testator, inserted for a purpose, it is inconceivable, we respectfully submit, that the testator could have intended to give Mrs. Hurxthal the fee to that property.

"The first and great rule in the exposition of wills, to which all others must bend, is that the intention of the testator, expressed in his will, shall prevail, provided it be consistent with the rules of law. * * *"

Montgomery vs. Brown, 25 App. D. C., 490, 493, quoting from Smith vs. Bell, 6 Pet., 68; DeVaughn vs. DeVaughn, 3 App. D. C., 50, 53; Holcomb vs. Wright, 5 App. D. C., 76, 83.

The intention the "first and great rule." Cruik vs. Owen, 25 App. D. C., 514, 519. This intention which "is to be discovered and carried out," in the language of the court in Moore's Estate, 241 Pa. St., 253, 257,

"means his actual personal intent, not a mere conventional intent inferred from his use of any set phrase or formal words." (Citations.) The intimation near the bottom of page 12 of appellant's brief that there is a positive rule of law in this case, is not attempted to be, and we believe cannot be, supported by a single authority. That a residuary clause is subject to the intention and to construction as other parts of the will, is fully recognized by the cases cited by appellant (p. 15), as well as those hereafter referred to in this brief. (See also *Montgomery vs. Brown*, 25 App. D. C., 490, 494.)

"General expressions in a residuary clause may be controlled and limited by the intention of the testator, as collected from the clause itself."

Executors vs. Dabney, 3 Rand. (Va.), 191, 210.

Under appellant's construction, the indefinite and general ninth clause is permitted to destroy the natural import of the specific words of the previous clause expressing a definite intention. In addition, the concluding words of the ninth clause, "Unto my niece, Cecelia Hurxthal of Chicago, Ill., *named as the beneficiary in item 4 hereof*," show the testator, in framing the ninth clause, had the fourth clause in mind; and if, having it in mind, he intended to enlarge or affect the specific words previously used, he certainly would not have affirmed the clause as it stood. It does not appear whether the testator owned other real estate, and the only facts before the court are those stated in the bill as amended (*Stewart vs. Masterson*, 131 U. S., 151, 158). If this point is important, the appellee prays that the cause may be remanded with leave to amend, but, as stated by the learned justice below, the ninth clause can be given full effect by operat-

ing upon the other property stated in the bill without changing the devise of the fourth clause. The ninth clause refers indifferently to estate, "real, personal *or* mixed," showing the testator contemplated no particular real estate, as we know he did in the fourth clause. (See *Shaw vs. Bull*, 12 Mod., 593, C. J.) No mixed estate is shown to have been owned, *yet the testator devised his mixed estate*. He was not, therefore, necessarily referring only to property then owned. As the court below said, "No inference of an intention to pass real estate by the residuary clause is necessarily to be drawn in the event no other real property than that mentioned in the fourth clause of the will belonged to the testator by reason of the fact that he therein used the word 'devise,' because in several clauses of the will by which he made gifts of money only he used the words 'I devise and bequeath' " (Rec., 13). If the ninth clause contemplated real estate then owned, it evidently was not the G Street property, for he would not have described it as estate "wherever the same may be found," having already designated it by street numbers. No significance can be attached to the words "and which I may die seized of," unless they were inserted to pass after acquired real estate, such words probably being necessary at that time to pass such property (*Crenshaw vs. McCormick*, 19 App. D. C., 494, 500). There was no question but that he was seized of the G Street property. Moreover, the devise of the ninth clause is absolute, while the G Street property is specifically put in trust; therefore the G Street property was not contemplated in the absolute ninth clause. (*Allum vs. Fryer*, 3 Ad. & El. N. S., 442.) An average layman, it is submitted, would take the words "after the foregoing have been fully carried out and settled" (settled can hardly refer

to anything but the fourth clause), to except the property before devised, to include only the residue of the *corpus* of the estate, and not to change any of the foregoing provisions. The ninth clause is not like most residuary clauses, which devise "all the rest, residue and remainder of my estate," but simply "the residue" of my estate, after the other provisions have been carried out and settled. Adverbs, such as "after," according to the decision of this court in *Johnson vs. Washington L. & T. Co.*, 33 App. D. C., 242, refer to the time of enjoyment, and not the time of vesting. Can it be said that the language of the ninth clause shows an intention to give Mrs. Hurxthal a remainder which she was to enjoy at her own death?

Upon the foregoing considerations, it is respectfully submitted that according to the natural and logical meaning of the language of the will, considered alone or in connection with the surrounding circumstances, the court below was correct in holding that Mrs. Hurxthal took a life estate in the G Street property, in accordance with the testator's intention.

Authorities.

DeVaughn vs. DeVaughn, 3 App. D. C., 50, appears to be the only case decided by this Court in which one of the parties sought to enlarge an express devise for life into a fee. In that case the provision of the will under consideration devised real estate in remainder to parties "during their natural lives, and at their death to be equally divided among the heirs of their bodies begotten, share and share alike, and to their heirs and assigns forever." This Court, Alvey, C. J., delivering the opinion, held a

life estate only passed to the remaindermen. The following portion of the opinion, in view of the limitation for life and trust provisions in the case at bar, seems very applicable here:

“Now, keeping in mind the principle that the intention must control, it would seem difficult, upon any principle of natural construction, to resist the conclusion, upon the terms of the devise, that Mrs. Mitchell took a life estate only, and the direction to divide the property equally, at her death, among the heirs of her body, was simply a direction that the property should be divided among her children. *If not, why the express limitation for life to the mother?* Or why the direction for equal partition of the property among the heirs of the body. Or why the super-added limitation to the heirs of the latter? If a fee simple estate was intended to pass to Mrs. Mitchell, and not to her children as independent devisees, all this elaborate phraseology to define the rights of the parties would have been quite useless. Indeed, the construction contended for by the plaintiffs in this case requires us to reject all the words directing partition, *and also the super-added words of limitation*, and to deprive them not only of their ordinary meaning, but of all meaning whatever. There is no sufficient reason apparent for depriving these terms of all meaning, or for supposing that the testator used them without understanding their legal or natural import.”

To hold that Mrs. Hurxthal took the fee in the G Street property would be to do what this Court condemned in the foregoing case, for such construction would not give to the fourth and previous clause any, certainly not its ordinary, meaning or import, while if a life estate only is

held to have passed both clauses are reconciled and given their consistent, natural meaning and import.

Adams vs. Massey, 184 N. Y., 62, is a very similar case to the present, though the court perhaps went further than in the case at bar. By the second clause of his will the testator gave his wife his residence and certain other property "to have and to hold during her natural life," followed later by a seventh clause which provided:

"I further give and bequeath any other property not herein otherwise disposed of that may be in my possession at the time of my decease,"

to his wife, "first to liquidate any indebtedness that may be against me, the balance, if any, to be at her sole disposal." The court said:

"The question presented for decision is whether the testator intended by the seventh clause of his will to include the property mentioned in the second clause and thus to destroy the limitation in the latter by making the gift absolute instead of for life only."

It is to be noted that there was a devise of the legal title without a trustee; that the seventh clause charged the wife with the payment of debts; that the former clause was not in any way reaffirmed as it stood, and that though the word "residue" was not used, the last devise was of "any property not hereinbefore disposed of that may be in my possession at the time of my decease." The court held only a life estate passed in the property mentioned in the previous clause (a part of which property was personalty), continuing:

“In reading the will we thus start with a limitation which could not be more simply expressed, nor could it be more plain, clear and unmistakable in its meaning. Such a limitation cannot be nullified by construction on the theory that where clauses are antagonistic the later must stand as the last expression of intention, because that theory rests only upon necessity and is never applied unless the last clause is as clear as the first, and can not be reconciled therewith. It is only when the later provision is as plain and decisive as the earlier; when the general intent of the testator cannot be gathered from the general scope of the will or otherwise, and when the two provisions are wholly irreconcilable and cannot possibly stand together, then, as a desperate remedy, resort is had to the last clause as expressing the last intent in order to save one instead of sacrificing both. (Citations.) While these cases relate to a change by cutting down an estate previously granted, the same principle applies to a change by which a limitation to life is converted into an absolute estate in favor of the same person, resulting in a disinheritance of the heir at law. ‘The legal presumption is that when a testator devises less than his whole interest, he knows that the law gives the remainder to his heirs.’ (Areson vs. Areson, 3 Den., 458, 464.) If there is no doubt as to the meaning of the earlier clause, while there is ~~no~~ doubt as to the meaning of the later, so that either of two constructions is possible, that construction will be adopted which will give effect to both. Doubt as to the meaning of the last clause, instead of destroying the limitation in the first, confirms it. An express limitation cannot be cut down by a clause of doubtful meaning. * * * The presumption against intestacy is met by the presumption against disinheriting the heir and assuming them to be of equal strength they neutralize each

other. (Bumpus vs. Bumpus, 79 Hun., 526, 530.)

* * * Giving adequate force to all presumptions and to the argument of both parties resting on the general scope and the real meaning of the will when all its provisions are read together, as well as upon the surrounding circumstances, we are of the opinion that the testator did not intend to destroy the limitation in the first clause and that he intended by the last clause to include only the money on deposit and such property as he expected to acquire after he wrote his will."

In Johnson vs. Stanton, 30 Conn., 297, it was held that an interest in a *fund* contingent upon a certain event was not contemplated in a very general residuary clause, the court saying, in part, as follows:

"Such general words cannot be allowed materially to alter other express provisions of the will, *introduced in respect to this fund when he had it under consideration*. His will is very explicit and precise in respect to the disposition of this fund. * * * The case of Allum vs. Frye, 3 Ad. & El., N. S., 442, is very similar to this in the facts upon this point, and in that case the general words of a residuary clause of a will were held to be controlled by very similar specific provisions in respect to specific property."

In Cecil et al. vs. Cecil et al. (1914), 161 Ky., 419, the will provided, "I give, devise and bequeath all the rest, residue and remainder of my estate, both real and personal, to my beloved wife, * * * to have and to hold during her lifetime and to her heirs and assigns forever." The court said:

"When a life estate has been once expressly created in a will, no language thereafter used in

the instrument, short of plain and explicit terms, will be deemed to have enlarged that estate. If the words 'and to her heirs and assigns forever' are to be given their strict technical meaning, and held to have passed the estate in fee, then we are confronted with an anomalous situation of a testator, after expressly creating in a devisee a limited estate in property, immediately thereafter, in the same clause and in the same sentence of his will, destroying the limited estate just created and substituting therefor an estate in fee. It is not conceivable that such could have been his purpose."

Especially in view of the concluding words of the ninth clause in the case at bar, showing a reaffirmance of the fourth clause, it is inconceivable that the testator intended to destroy the estate expressly given; if *Cecelia Hurxthal* took the fee the intentions expressed in the fourth clause are not given effect.

See also, *McGuigan vs. Jaeger*, 36 App. D. C., 227, 229-30.

Allum vs. Fryer, 3 Ad. & El., N. S., 442.

Phillips et ux. vs. Melson et al., 3 Munf. (Va.), 76.

Kennon vs. M'Roberts & Wife, 1 Wash. (Va.), 96, 111.

Horde vs. M'Roberts, 1 Call. (Va.), 337.

Harris vs. Mills, 4 N. C., 149.

Shouler, 5th Ed., Sec. 474.

"There are no grounds, however, for eliminating words which indicate a particular intent, unless, at least, they can be shown to be utterly inconsistent with a primary or general intention otherwise clearly manifested."

Johnson vs. Washington L. & T. Co., 33 App. D. C., 242.

"Where a former clause is express and particular, no subsequent clause shall be permitted to enlarge it, if the two clauses can stand. * * * All the parts of a will are to be construed in relation to each other, so as, if possible, to form one consistent whole."

Graham vs. Graham, 23 W. Va., 36, 40.

The appellant states (brief, p. 15) that "no provision whatever in the fourth clause of the will is 'rendered nugatory,' *nor in any way affected*, by construing the residuary clause as passing the reversion, which is separate and distinct from the life estate." If Mrs. Hurxthal took a life estate under the will she did not take a fee. The whole will, of course, went into effect at the same time, immediately upon the death of the testator (Lynch vs. Lynch, 37 W. L. R., 11), and if there was a reversion as appellant contends it is now in the heirs, for a reversion is something *left in the testator* after the vesting of the particular estate. (Code, Sec. 1019, 24 Am. & Eng. Ency., L. 420 et seq.) If the entire estate was disposed of at the testator's death there was no reversion, and if the fee to the G Street property vested in Mrs. Hurxthal, then the limitations of the fourth clause must be disregarded, for they limit her interest therein to an equitable life estate, with the legal title in a trustee who is given complete control. The attempted sale of the fee which gave rise to this suit, was in disregard of the fourth clause. This effect of the appellant's construction cannot be overcome by a paper separation of the property:

"The testator was dealing with a known condition and not with a theory. He was employing ordinary words with their natural import."

Cruit vs. Owen, 25 App. D. C., 514, 523.

If the words of the fourth clause "are in no way affected," then Mrs. Hurxthal took an equitable life estate, leaving the ninth clause, in accordance with the testator's intention, to have full effect by operating upon the other property, and as contemplating after acquired property.

If the language of the will could by any conjecture be held to show an intention to give a life estate in the rents and profits, then give a reversion in the same property to the same person, by the same instrument, and thus the fee (wiping out the explicit provisions for life), nevertheless, the life estate being equitable and the reversion legal, the two would not merge in view of the intention manifested by the fourth clause and the acts and declarations of the testator. (Smith, executrix, et al. vs. Roberts, 91 N. Y., 470; Fowler vs. Fay et al., 62 Ill., 375, 377; Andrus et al. vs. Vreeland et al., 29 N. J. Eq., 394.)

Equity does not favor merger, and the will being clearly open to a construction consistent with the rules of law, one will not be adopted which imputes to the testator an intention to accomplish that which is prohibited or not favored.

The Rule In Favor of the Heir.

A material consideration in favor of the construction adopted below, is that at the time of this will words of inheritance were necessary to pass the fee, unless, without them, an intention to do so *clearly and unambiguously appeared*.

In Wright vs. Page, 10 Wheat., 204, 227, 288, quoted in McCaffrey vs. Manogue, 196 U. S., 563, 569, the Supreme Court said:

"Where there are no words of limitation to a devise, the general rule of law is that the devisee takes an estate for life only, unless from the language there used, or from other parts of the will, there is a plain intention to give a larger estate, we say a plain intention, because if it be doubtful or conjectural upon the terms of the will, or if full legal effect can be given to the language without such an estate, the general rule prevails. It is not sufficient that the court may entertain a private belief that the testator intended a fee; it must see that he has expressed that intention with reasonable certainty on the face of his will. For the law will not suffer the heir to be disinherited upon conjecture. He is favored by its policy, and though the testator may disinherit him, yet the law will execute that intention only when it is put in a clear and unambiguous shape."

It is respectfully submitted that this language is conclusive that in the case at bar only a life estate passed to Mrs. Hurxthall in the G Street property. There is not a clear and unambiguous intention to give the fee; there are no words of inheritance; *there is a clear devise for "her natural life."*

The heir's title is founded on the law, paramount to and independent of the will, and he needs no argument or construction in his favor, these belonging to the party claiming in opposition to him. *Graham vs. Graham*, 23 W. Va., 36, 40; see also, *McAleer vs. Schneider*, 2 App. D. C., 461, 467; *Atkins vs. Best*, 27 App. D. C., 148, 152; *Beall vs. Holmes*, 6 H. & J., 205, 209, 210; 1 Munf. (Va.), 548, quoting Lord Mansfield in the case of *Mudge vs. Blight*, Cowper, 355.

Appellant cites *Atkins vs. Best*, 27 App. D. C., 148, 153, to the effect that the heir is no longer favored (p.

12), but this Court in that case very plainly stated that the rule did prevail at the time now in question, citing *Wright vs. Denn*, *supra*, and *McAleer vs. Schneider*, 2 App. D. C., 461. The court added that as men now usually deal with the fee, the tendency of the latest decisions seems to be to search the will for the sufficient indication of an intention to take the case out of the operation of the rule. We do not desire to dispute that the intention is paramount to the rule favoring the heir, as it is to all other rules of construction, but it would seem that the intention must be "plain and unambiguous." The rule was relaxed only when the intention appeared to give the fee, as when words of inheritance were unintentionally omitted. But in the case at bar the words were not only omitted, but the devise of the property in question was expressed limited to an equitable estate "during her natural life." In *Atkins vs. Best*, this Court, so far from overriding the words "during her life," held that the fact that those words were used in one devise in the will then before the court, and omitted in another devise of different property, showed an intention to pass *the latter* in fee; in other words, the limitation for life was made when the testatrix intended only a life estate to pass, as we submit was done in the will now before the court. Here the intention and the rule favoring the heir go hand in hand.

As to appellant's position that no heir was forgotten, and that Mrs. Hurxthal and Christopher C. Wells were the heirs (pp. 11-12 of brief), it is submitted that, as appears from the record (p. 2), only the brother, Christopher, was the heir. No inference that Mrs. Hurxthal is an heir can be drawn from the statement of the bill (R., 2) that testator died leaving as his heirs and next of kin (a conclusion of law) the persons there named, as it

affirmatively appears at the point indicated that some of those named were only relatives, not heirs. *Only Christopher C. Wells is shown to be an heir*, and he was given only \$500, though a nephew was given \$1,000, a great niece \$2,000, a great-great niece \$400, Mrs. Hurxthal, a niece, a life interest in the G Street property, and the rest of his property (netting the sum of \$5,774.44, after payment of debts, legacies, etc., Rec., 3). It is not unnatural that testator should have given a great-great niece only \$400, but that he should have given his brother's son \$2,000, and only \$500 to his own brother, appears unusual, unless we adopt the construction that he limited the bequest to \$500 because he intended the reversion in the G Street property to go to him, thus equalizing the distribution, which is a more commendable view than one which without warrant imputes to the testator inequality of affection. *Galloway vs. Galloway*, 32 App. D. C., 76, 79, does not support to any extent the proposition for which it is cited (p. 12). In that case testatrix devised land to ~~his~~^{her} daughter, absolutely and in fee, and also all personal effects, etc. Testatrix later sold the land, and the question was whether the daughter took the money resulting from its sale. Two sons who opposed this construction were bequeathed \$5, which showed she had them in mind and did not wish them to share substantially in the estate, of which there is no indication in the case at bar. The devise of the land in fee to the daughter in the case cited showed an intention to give her all the interest therein. *Finlay vs. King's Lessee*, 3 Peters, 346, 379, also cited, is so unlike the case at bar on its facts that it is submitted any expression of the court as to the intention in that case throws no light on Mr. Wells' intention. The full statement of the court which the appellant's brief probably refers to shows the difference between the two cases:

"The circumstances that his mind was clearly directed to each, and that he has carefully measured out his bounty to each, discriminating between them so as to show *great inequality* of affection, operate powerfully against the opinion that he intended to leave *a very large property* to descend upon them by the silent operation of the law. *The whole will proves the primary intention of the testator to have been to keep his immense real estate together, and to bestow this splendid gift on some individual who should proceed from the union of his own family with that of his wife.*" (380-1.)

The construction of the court below accords with the will and intention disclosed, is equitable, accords with the rule favoring the heir, gives effect to the whole will, and produces no occasion to infer the brother was not regarded as affectionately as more distant relatives.

The Construction of the Parties.

It is respectfully submitted that if there is doubt as to the construction of the will, then under the decision of this Court in *Travers vs. Reinhart*, 25 App. D. C., 567, the construction adopted and acquiesced in by the parties should be given effect. This construction and acquiescence of the parties for twelve years is not set up to vary or overcome the true meaning of the will, but as entitled to weight in the solution in case of doubt. The bill alleges that the testator himself and the draftsman and executor adopted the construction that a life estate only passed, and that such construction was communicated to the trustee appointed by the fourth clause, to the equitable life tenant, and to the appellee, all of whom ac-

quiesced in said construction until the sale which caused the appellee to come into court to protect the interests which had for many years been considered by him and the other parties as his own, "during which time the trust created by the said will was continued and held binding on the parties concerned, with its attendant payment of commissions * * * in acquiescence in the construction so as above placed upon the will." (R., 4.) The payment of 10 per cent commission on the faith of such construction for twelve years amounted to a parting with very valuable rights, and it is not unreasonable to suppose that if the other parties in interest knew Mrs. Hurxthal and the trustee were going to abandon such construction the said parties would have acted on their rights before the abandonment.

"A circumstance in favor of this construction of the will is the practical interpretation placed upon it by the family," though not a controlling factor.

Smith et al. vs. Bartlett, 79 App. Div., 174, 178.

"It is a rule that has been followed by the courts many times when the language of a will is ambiguous, to give effect to the construction unanimously placed upon it by all the interested parties."

Jessup et al. vs. Witherbee Real Est. & Imp. Co., 117 N. Y. Supp., 276, 279.

See also Pate vs. French et al., 122 Ind., 10, 14;
Coulter vs. Crawfordsville Trust Co., 45 Ind. App., 64; Hooe vs. Hooe, Wythe (Va.), 190.

Turner's Appeal, 48 Mich., 369, 373, cited by the appellant against this proposition (p. 8), was a case in which the court said the will was "fairly open to only one con-

struction." In that case, also, the construction was not adopted by the testator nor adopted and acquiesced in by the parties for years, but only "the parties in making up the case have expressed their assent to the proposition that an intestacy existed." In *Emery vs. Haven*, 67 N. H., 503, also cited, pp. 9-10, the construction of the parties related to a *prior* will which had been destroyed, and not to the will before the court; moreover, there was no doubt on the face of the will as to the intention, and the construction of the parties was of course incompetent to vary or overcome the terms of the will. Throughout the discussion in the opposing brief on this question and on the question of the admissibility of the declarations of the testator, it is incorrectly assumed that the evidence is offered to vary or overcome the meaning of the will. This Court has repeatedly held that extrinsic evidence is not admissible for such a purpose, *and the construction of the parties is not offered in the case at bar for any such purpose*. We earnestly believe that the learned court below correctly held that the will shows the intention was to give only a life estate to Mrs. Hurxthal, and the construction of the parties is offered only as a legitimate aid to the court in the solution of any doubt which may be given rise to by attaching what we submit is an unwarranted meaning and effect to the ninth clause. This Court, we respectfully submit, in the *Travers* case clearly recognized the justness, in case of doubt, of construing the will as the parties themselves have done. There is no attempt to make the will of the testator; indeed, the *testator himself* adopted the construction of a life estate only as the true one (R., 4). The rule cannot be affected by Mr. Brown's knowledge of the facts; he may have known of them; we do not know what price he paid; he has a warranty deed, and he is the only one who has appealed; the will was on

record, and the deed to his grantor recited facts which put him on actual notice of the will's terms; the deed to Fitzmorris and from him to Brown was the result of one transaction (R., p. 5); the appellant must have known that he at least took a doubtful title, and therefore that all proper evidence could be used in the construction of the will.

The Extraneous Evidence.

"It is a common remark that when interpreting a will, the attending circumstances of the testator, such as the condition of his family and the amount and character of his property, may and ought to be taken into consideration. The interpreter may place himself in the position occupied by the testator when he made the will, and from that standpoint determine what was intended."

Cruit vs. Owens, 25 App. D. C., 514, 519; Blake vs. Hawkins, 98 U. S., 315, 324; Holcomb vs. Wright, 5 App. D. C., 76, 83; Walston's Lessee vs. White, 5 Md., 297; Chase et al. vs. Stockett et al., 72 Md., 235, 241-2; Warner vs. Miltenberger's Lessee, 21 Md., 264; Lynch et al. vs. Lynch et al., 37 W. L. R., 11; Atkins vs. Best, 27 App. D. C., 148, 152-3.

The allegations of the bill (R., 4) as to other property of the testator, embracing a considerable sum in promissory notes secured on real estate, the facts that he relied upon the advice of Mr. Yoder, both being unfamiliar with technical language, *and that Mr. Yoder told him the effect of the language used was to leave him intestate as to the reversion*, are facts which it is necessary to consider in order to understand the situation of the testator and the meaning of his words; these facts are not offered

to vary the meaning of a single word of the will or to enlarge or diminish any devise, or to overcome any intention, but simply as legitimate aids in determining which of two possible constructions accords with the intention, if there is a doubt. Counsel for appellee respectfully submit that if this Court desires to consider the situation of the testator, the facts above set forth show very plainly what was his meaning, and show plainly that the subject matter to which the word "residue" applied was the residue of *corpus* of his estate.

"Extrinsic evidence is inadmissible to show that he *meant* something different from what his language imports; but any evidence is admissible which, in its nature and effect, simply explains what the testator *has written*; in other words, the question in expounding a will is not what the testator meant, as distinguished from what his words express, but simply what is the meaning of his words. And extrinsic evidence, in aid of the exposition of his will, must be admissible or inadmissible with reference to its bearing upon the issues which this question raises. Wigram's Rules of Law, p. —. So, again, proposition fifth of the same author, which is, 'for the purpose of determining the object of the testator's bounty, *or the subject of disposition*, or the quantity of interest intended to be given by his will, a court may inquire into every material fact relating to the person who claims to be interested under the will, and to the property which is claimed as the subject of disposition, and to the circumstances of the testator, and of his family and affairs, for the purpose of enabling the court to *identify* the person or *thing* intended by the testator, or to determine the quantity of the interest he has given by his will.'

Walston's Lessee vs. White, 5 Md., 297, followed in Chase et al. vs. Stockett et al., 72 Md., 235.

In Hunting vs. Emmart, 55 Md., 266, 276-7, the court held parol evidence admissible when—

“the terms of the instrument are technical or equivocal on its face, or are made so by reference to extraneous circumstances.” (Citations.)

It is submitted that it is universally recognized that parol evidence is admissible to apply a devise to its subject matter; and when the words of the will may be applied indifferently to two subjects, or have two interpretations, not only are the facts already mentioned admissible in evidence, but also the declarations of the testator, because when the words have two interpretations the will contains a *latent ambiguity*.

“The difficulty in distinguishing between patent and latent ambiguities led Judge Story to suggest that there was an intermediate class, partaking of the nature of both patent and latent ambiguities, i. e., ‘when the words are all sensible and have a settled meaning, but at the same time consistently admit of two interpretations, according to the subject matter in the contemplation of the parties.’ This subject is fully discussed in the notes by Cowen & Hill, and Edwards to 2 Phillips on Ev., Sec. 3, Ch. 8. The solution of the difficulty by Prof. Greenleaf in assigning ambiguities of this character to the class of latent ambiguities, is perhaps as satisfactory as can be suggested, and reconciles many apparently conflicting statements of the rule. Looking in the case before us to the situation of the testatrix, the condition of her

family, the character and quantity of her estate and the *res gestae* of the execution of the will, we see plainly what she meant and intended to do, and no violence is done to the words she has employed."

Schlottman vs. Hoffman, 73 Miss., 189.

In Ladies' Union Soc. vs. Van Netta, 88 N. Y. S., 413, a letter of the testatrix was introduced and considered by the court to clear up an intention which was obscure and uncertain because of inconsistent provisions of a will and codicil:

"If, taking the whole will, and reading that with the codicil, the intention of the testator is left obscure and uncertain, then it is competent to resort to extraneous evidence for the purpose of finding the real intent of the testator."

"If the evidence of surrounding facts and circumstances is admitted to explain the sense in which the words were used, certainly proof of the declarations of the parties, made at the time, of their understanding of them, ought not to be excluded." (Citations.)

Morgan vs. Burrows, 45 Wisc., 211, 219.

See note to Doe vs. Roe, 1 Wend. (N. Y.), 542, 550, in which case it is said:

"In cases of latent ambiguity, I do not observe in the books any exclusion of this kind of proof (the declarations of the testator), the cases where such declarations or instructions have been excluded, are cases where there was no ambiguity at all," the note stating that although the necessity may appear on the face of the will, nevertheless the above rule would necessarily be applicable.

It is accordingly submitted that the situation of the testator, including the fact that he was advised the words left him intestate as to the reversion, is proper to be considered, in case of doubt, to throw light on the meaning of the testator's words. There can be no question but that a man would use the word "residue" to mean the property not mentioned, or that left after taking away from the body of the estate property "A," "B" or "C," etc., especially when any other construction would defeat a clearly expressed intention. The declarations of the testator are also admissible, it is submitted, under the foregoing authorities, and because a part of the *res gestae*.

"With three exceptions, evidence of the testator's intention is inadmissible in explanation of a will. These exceptions are as follows: (1) What is said at the time of the execution and attestation is admissible as part of the *res gestae*, though not to contradict the will; (2) when it is doubtful to which of two or more extrinsic objects a provision, in itself unambiguous, is applicable; (3) when a will is attacked for fraud or coercion."

Wharton Ev., Sec. 992, cited in *Klock vs. Stevens et al.*, 45 N. Y. Sippl., 603, 606, where it is said:

"The evidence of Mr. Ferry who drafted the will, makes it entirely certain that the testator took that view at the time the will was drawn, namely, that the gift of the mortgage would be a satisfaction of the debt. This is extrinsic evidence, but is part of the *res gestae* and is competent, within the rule laid down by many authorities. * * *

The evidence of the declarations is not in conflict with the provisions of the will."

See Dawson vs. Waggaman, 23 App. D. C., and Nolan vs. Bolton, 125 Ga., 352.

If it is not plain that Mrs. Hurxthal took only a life estate, it is certainly not plain that she took a fee; the fourth clause is clear, and any doubt must grow out of the sense in which the testator used the word "residue"; there being no positive rule of law in the case, it is respectfully submitted that the word in the will of Mr. Wells means the residue of his property, and not the residue of an interest in particular property, certainly not property already limited in a manner inconsistent with such construction.

In none of the cases cited ^{by appellant} on the admissibility of the declarations was the question of *res gestae* raised, nor does it appear that that question could have been raised, and in each of them the Court stated that there was no ambiguity. Counsel for the appellant has cited no authority against the propriety of the court considering the situation of the testator at the time, including the fact that he was advised his will left him intestate as to the reversion.

We have carefully examined each of the cases cited by appellant's counsel as to the effect of the motion to dismiss as to raising the question of the admissibility of the declarations (brief, 5-6), and we are agreed that the admissibility of the evidence of declarations, situation of the testator, construction of parties, etc., is not conceded by the motion below; the fact that the declarations, etc., were made, being facts distinctly alleged, is admitted, and the question is, Is the evidence competent? Pullman Co. vs. Missouri Pacific Co., 115 U. S., 587. None of the cases cited by appellant's counsel deny this principle, and

it is respectfully submitted that under the authorities already considered the evidence is competent. The appellant has admitted the *facts* for the purposes of this case.

Other Portions of Appellant's Brief.

It is submitted that consideration of opposing brief, already considered in part, and the authorities cited, strengthen the view that the appellant has only a life estate in the property devised to Mrs. Hurxthal by the fourth clause of the will.

To this view the appellant opposes the canon that a testator is presumed not to die intestate (p. 10). It is to be noted that in neither the introductory nor residuary clause is there a declared purpose to dispose of the whole estate, and that the latter clause applies indifferently to real, personal *or* mixed property. In the second place, at the date of this will, the presumption against intestacy was no stronger, indeed not as strong, as the rule favoring the heir. As stated by this Court in *Colville vs. American Security & Trust Company*, 10 App. D. C., 56, 69-70, the rule favoring the heir seemed to be a great deal more regarded by the authorities than the rule against intestacy.

"If other words be used restraining the meaning of the general expressions, so as to render it doubtful whether the testator intended to pass his whole interest or not, the rule of law which favors the right of the heir must prevail."

Lambert's Lessee vs. Paine, 3 Cr., 97, 129, 131.

"The rule that a testator is presumed to have intended not to die intestate as to any part of his estate is not of greater force than the rule that an

heir is not to be disinherited except by express words or necessary implication." (Citations.)

Watson vs. Martin, 228 Pa. St., 248-250. See also English's Estate, 242 Pa. St., 445, 457; Dunn et al. vs. Hines et al., 164 N. C., 113, 116. (See authorities, pp. 14-17, *supra*.)

Taylor vs. Leesnitzer, 37 App. D. C., 356, 361, is cited by appellant's counsel (p. 10), but so far from holding that in the case at bar a life estate only passes to Mrs. Hurxthal in the G Street property, that case holds that very probably what Mr. Wells meant by the fourth clause, if it referred to real estate, was to pass after acquired property, "which I may die seized of." The statement of the Court that in a general devise, especially by residuary clause, the testator will be considered as meaning to dispose "to the full extent of his capacity," can only refer to property included in the general devise, and not to property not contemplated therein. Galloway vs. Galloway, 32 App. D. C., 76, 80 (p. 10 of appellant's brief), was also a very different case on its facts, and states only the undisputed general rule of a presumption against intestacy. English vs. Cooper, 183 Ill., 203, 209, next cited, held a gift of the "rest, residue and remainder" of a particular fund to be derived from the sale of real estate, carried lapsed legacies to be paid out of the fund, especially as the lapse occurred during testator's life. Moreover, the Illinois statute had dispensed with words of inheritance to pass the fee. (Ed. 1909, p. 524.) Neither William vs. Heard, 140 U. S., 529, 543, nor Lambert vs. Paine, 3 Cr., 97, 134, 135, is authority for the statement at page 11 that the words of the residuary clause in the case at bar are the full equivalent to a devise of "all the estate, real and personal, of every na-

ture and description in law or equity," nor authority for the proposition that such words would, *per se*, overcome or affect an intention such as expressed in the fourth clause. In 1 Washburn, 6 Ed., 116, cited at page 11, the author refers to a reversion in one person depending upon a life estate in another, as we contend the heirs of Mr. Wells are seized of the reversion dependent upon the life estate in Mrs. Hurxthal. Mr. Wells owned the *fee*, and if at his death there was a reversion, it is now in the heirs. (Code, Section 1019.)

Pollock vs. Farmers' L. & T. Co., 157 U. S., 429, 580, 589, is cited at p. 12, to the effect that it would seem the devise by the fourth clause of the rents and profits passes the land itself. If so, it would only be for life. The case cited, however, held only that a simple devise of the rents and profits carries the property, there being no trust provisions nor equitable estate in that case. The brief then states that this question, whether the estate was legal or equitable, is unimportant, since the same rules of law apply in either event, citing Doe vs. Considine, 6 Wall., 458, 469. That case holds only that where a person comes into property by descent or devise, the legal or equitable nature of the estate makes no difference. *But in construing a will* it may make a difference, as, for example, the rule in Shelley's case would not operate when one of the estates was legal and the other equitable. (Simms vs. Georgetown College, 1 App. D. C., 72; Vogt vs. Vogt, 26 App. D. C., 46), and merger is not favored in equity (Smith et al. vs. Roberts, 91 N. Y., 470; Fowler vs. Fay et al., 62 Ill., 375, 377; Andrus et al. vs. Vreeland et al., 29 N. J. Eq., 394). In determining the intention of the testator, the fact that when we know the testator had the G Street property in mind he limited the

estate to Mrs. Hurxthal to an equitable life estate, shows he did not intend to give her the fee.

The reason which is assigned at pages 12-13 of his brief for the 10 per cent commission cannot help the appellant. In the first place, the desire of the testator for a trustee to control the property is no reason for a 10 per cent commission, but such commission is inconsistent with a fee. The very reason given, namely, that the beneficiary was in Chicago, the trustee in Washington (which does not appear from the record), and that the beneficiary was no longer young (which is an inference), shows that the intention was to give only a beneficial interest in the property, *under the control and management of the trustee*, which intention is defeated under appellant's contention. In the second place, the desire for a trustee was no reason for limiting the estate *for life*, or limiting it to the rents and profits. There is nothing in the record to show that the removal of the trustee to Pittsburgh was in any way connected, in time or otherwise, with the sale of the property. Nor could the removal, it is submitted, nor the consequent alleged desire to change the investment, in any way relate back to change the intention of the testator. Indeed, the trustees' removal would have been an advantage to Mrs. Hurxthal, for then the court could have appointed a competent trustee with a reasonable and usual commission. In the third place, the reason assigned is purely conjectural and is not based on any words of the will. That the trust provisions of the fourth clause in regard to the trustee are irreconcilable with the fee, see *Mather vs. McClure*, 136 N. Y., 238.

The further contention of appellant (pp. 13-14) that the blending of the personalty and realty operates to charge the legacies upon both, would strengthen the po-

sition of the court below that the primary object of the testator was to give a life estate to Mrs. Hurxthal, and to provide for the other legacies^{test}, including the heir. Moreover, (Section 146 of the Code) enacted subsequent to *Readman vs. Ferguson*, 13 App. D. C., 60, cited p. 13, but prior to the will, made the personalty the primary fund for the payment of legacies. In the second place, the principle announced in the case cited is not here applicable, for in the case at bar the question in controversy must be found in favor of appellant *before the rule there announced could apply*, namely, was the whole estate included in the residuary clause? In the third place, such construction is not based on any words of the will, and is purely conjectural, a method of construction which this court has condemned. Finally, on this point, the *situation of the testator's estate at the time*, his age and sickness, etc. (R., 2-4), conclusively show the lack of foundation for the contention. *Van Gillurve et al. vs. Becker et al.*, 106 N. Y. Suppl., 1080; *Harvey vs. Kennedy et al.*, 80 N. Y. Suppl., 878; *Turner et al. vs. Mather et al.*, 83 N. Y. Suppl., 1013, affirmed without opinion, 179 N. Y., 581-2; *Wiltsie vs. Shaw*, 100 N. Y., 191, 196; *Duncan et al. vs. Wallace*, 114 Ind., 169, 171; *Hoyt et al. vs. Hoyt et al.*, 69 N. H., 303, 305. (30 N. 436, 8)

Appellant concedes that the primary object of the testator was to give Mrs. Hurxthal the rents and profits for life; yet the construction he contends for has resulted in the defeat of this very intent, for the sale of the property which was made (at an unknown price) no longer gave Mrs. Hurxthal the rents and profits, and the proceeds were placed in her hands free from the control and management of the trustee, contrary to the intention of the testator as expressed in the fourth clause of his will, and

contrary to his desire that she receive the rents and profits for life.

O'Brien vs. Dougherty, 1 App. D. C., 148, 164, in no way supports the proposition for which it is cited at page 13 of appellant's brief; and Leadwell vs. Cordis, 71 Mass. (5 Gray), 341, 353, cited at page 14, holds only that the terms "the residue of my estate, after the payment of my just debts," did not prevent the vesting of the estate immediately on testator's death, subject to the debts. Nor is the statement at page 14 that the learned chancellor below thought the case came within the exception to the general rule as to lapsed legacies passing under a residuary clause, in any manner supported by the record. No such question was argued or considered, or referred to by the court, the decision resting upon the intention of the testator (R., 14).

Of the cases cited by appellant (p. 15) to the effect that the question is no longer open in this jurisdiction, all are quite different on the facts. The first is Young vs. Norris Peters Co., 27 App. D. C., 140, 147. But there the first devise was not expressly limited to life, it seemed there was a doubt but that the fee passed by it, and as the residuary clause was in favor of the same person, the court held the fee did pass to him. Here the first devise is expressly for life. It is also to be noted that the residuary clause in the case cited was more general and unrestricted, and that there was not a devise of only the rents and profits for life, with a trustee and 10 per cent commission. In Davis vs. Callahan, 78 Me., 313, next cited, there was an introductory clause which the court laid hold of, to the effect that testator disposed of *all his worldly estate*, and the residuary clause was of "*all the rest, residue and remainder of my estate, real and personal and mixed*," etc. This is the only case cited by appellant

where the first devise was expressly for life, and it is difficult to see what other construction the court could have adopted in that case than that the intention was to dispose of the whole estate, the testator having twice expressly so stated. There was no trust, nor devise of the rents and profits or commission. It was there said: "Courts will be cautious in the application of legal principles deduced from what may seem to be analogous cases, and in each case will endeavor to ascertain the meaning of the testator from the language he has used." (Williams vs. Goodtitle, 10 B. & Cr., cited in the Davis case, held the residuary clause passed property which could not go as previously devised because of an illegal trust.) In Craig vs. Rowland, 10 App. D. C., 402, 414, next cited, the residuary legatee was a different person from the life tenant, and hence there was no inconsistency; there was a devise for life to two persons and after their death to the children of one of them (Craig), should he have any, and if not then to testator's right heirs. Testator further declared that "the rest, residue and remainder of my estate, real, personal and mixed, I give, devise and bequeath, subject to the charges hereinbefore contained, and not otherwise, to my sister, Susan M. Burche, her heirs and assigns," etc. The court first stated that the limitation to heirs was simply a reservation of the reversion if not otherwise disposed of, and that the residuary clause passed the remote reversionary interest contingent upon the death of Craig without descendants, the residuary legatee, as stated, not being the life tenant—clearly a very different case. In Mayer vs. American Security & Trust Co., 33 App. D. C., 391, 398, the question was really whether testator had a devisable interest in certain property, and, determining he had, the court held it passed under a "comprehensive residuary

clause." There was no question of inconsistency with a prior devise to the same person, *nor any indication of an intention to give a life estate*; the question was not what estate passed, but *whether the property was devisable*; if so, it passed under the comprehensive residuary clause.

In *Cushman vs. Arnold*, 185 Mass., 165, 169, the life tenant was *one of a class* among whom the residue of the entire estate was to be divided, and it was held, only, that the fact that the life tenant could not come into possession of the remainder did not change the time of its vesting. *Chesman vs. Cummings*, 142 Mass., 65, holds that where property is conveyed in fee to trustees, for the use of the grantor for life, and where the said grantor had made a will directing his executors to sell his real estate, there was a resulting trust in his favor in the reversion, which passed to the executors. *Robinson vs. Mitchell*, 99 Md., 50, 52, is a case similar to the *Cushman* case. It is respectfully submitted that no one of these cases, on their facts or the principles applied, throw light on the case at bar.

18 App. D. C., 24, 25, 26, next cited (p. 16), holds that where a testator has made a will, not anticipating an unusual event which may defeat what was probably his intention, the court cannot supply the intention in case the unanticipated event does happen. *Mayer vs. Am. S. & T. Co.*, 222 U. S., 295, 300, cited p. 16, is the same case reported in 33 App. D. C., 391, 398 (already considered), on appeal to the Supreme Court. The Supreme Court said:

"No doubt Mayer (testator) thought that the Chevy Chase property would go another way (i. e., by a previous deed which he had made), but it manifestly was not certain, and moreover, one of the objects of the residuary clause is to gather up unremembered as well as uncertain rights."

The uncertainty there was whether the testator actually had a devisable interest in the property. There is no doubt in the case at bar but that Mr. Wells had the fee to the property in question, nor could there have been any uncertainty in his mind as to whether the fourth clause conveyed only a life estate. The appellant practically concedes, at the top of page 16, that the real intention was to give a life estate, and as there is nothing in the will to overcome the intention, it should control.

Floyd vs. Carow, 88 N. Y., 560, 568, cited in Riker et al. vs. Cornwell et al., 113 N. Y., 115 (p. 16 of appellant's brief), would seem to state the principle applicable to the case at bar in the following words:

"A particular interest, or estate, will not pass by a residuary clause when it appears from other portions of the will that it was the intention of the testator to exclude such particular interest or estate from the residuary gift. (Strong vs. Teatt, 2 Burr., 912; Hambleton vs. Darrington, 36 Md., 434.)"

This principle is also recognized in the Riker case. It was there held that *legacies which failed* went into the comprehensive residuary clause, there being nothing appearing from the will showing an intention to exclude such property. It was an entirely different case. Davis vs. Callahan, next cited, has already been considered (*supra*, p. 32-3). As the court below said, in this connection, and appears from the record (2-3), the residuary clause will be given its ordinary natural meaning and effect without changing the devise of the G Street property, but if the ninth clause is held to give the fee then the fourth clause, and the concluding words of the ninth clause itself, are refused their meaning, though the fourth clause shows a *definite intention* in regard to the prop-

erty in question, while the residuary clause is indefinite and does not mention the property except by impliedly reaffirming the previous devise.

It is not apparent what counsel for appellant means by "either Cecelia Hurxthal or no one" (p. 16). The heir takes by law, and was not disinherited unless the intention to do so was plain and unambiguous (*supra*, pp. 14-17).

In both *Watson vs. Watson*, 110 Mo., 164, 170, and *Page vs. Atkins*, 60 N. C., 268, cited at page 17, the residuary legatee and the life tenant were different persons, and there was no question of enlarging a specific life estate into a fee, nor was the will in either case in any way inconsistent with an intention to include the reversion in the residuary clause. In the case at bar, there was no reversion unless Mrs. Hurxthal took a life estate, and if she took a life estate the intention was not to give a fee, and the reversion is in the heirs.

As to the argument of appellant's counsel, pp. 17-19, in regard to the other real estate, it is respectfully submitted that the only facts before the Court are those stated in the bill, as amended (and on demurrer every reasonable intendment is to be made in favor of the pleader). *Stewart vs. Masterson*, 131 U. S., 151, 158.

As the Court below stated, it does not appear whether ~~the testator owned other real estate, but it was stipulated~~ not wish any advantage either, because of the stipulation, below that the bill "shall be read as if amended by striking out the words, 'and none other'" (R., 10); this stipulation made it unnecessary for appellee to amend the bill, which otherwise he doubtless could have done, and therefore we do not think that any advantage should be claimed by appellant, because the amendment was made by stipulation. Is not the stipulation as binding upon the appellant as the original bill would have been upon the

appellee without the amendment? But we certainly do not wish any advantage either because of the stipulation, but only that it be considered according to its terms. It is not unusual for parties to correct mistakes in sworn pleadings. The petition for probate, though mentioned in the bill, is not a part of the record; it does not appear whether the petition did set forth other real estate; in any event, its contents would not be conclusive. If the question of whether or not there was other real estate is material, we ask that the cause be remanded with leave to amend, setting forth the facts in full.

As to the statement of counsel for appellant that if the petition for probate mentioned other real estate, the words, "and none other," would never have been in the bill, we beg to say that the stipulation would never have been requested if the bill correctly stated the facts as we understood them; and, but for the position taken in his brief, it is not unreasonable to assume that if appellant's counsel believed there was no other real estate, he would not have signed the stipulation. We do not think it fair to the appellant, in the absence of the facts from the record, to state the reason why the stipulation did not go on to state the character and location of other real estate, as he seems now to think should have been done if the testator owned such estate (pp. 18-19).

By the principles of construction, applicable to the will alone, and to the will in connection with all the evidence proper to be considered, and admitted by the motion to dismiss, the order overruling the motion should be affirmed, it is

Respectfully submitted,

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If the testator intended to charge the legacies on the reversion, such intention, if manifested in the will, would be carried out regardless of whether the G Street property passed under the ninth clause, but if it did pass under the ninth clause the 4th clause is wiped out.

